BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CASSANDRA RILEY	)	
Claimant	)	
	)	
VS.	)	
	)	
HILLSHIRE BRANDS COMPANY[1]	)	
Respondent	)	Docket No. **1,063,710**
	)	
AND	)	
	)	
INDEMNITY INS. CO. OF N. AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 21, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven Howard. Steffanie Stracke, of Kansas City, Missouri, appeared for claimant. Brian Fowler, of Kansas City, Missouri, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript dated June 11, 2013, with exhibits; the deposition of Anita Antony, dated June 24, 2013; the preliminary hearing transcript dated October 15, 2013, with exhibits; and all pleadings contained in the administrative file.

The ALJ found:

> [B]ased upon the foregoing, the Administrative Law Judge is unpersuaded by the testimony of Ms[.] Antony that she had or did not have conversations regarding claimant[']s occupational accident. Suffice [it] to say, claimant has established as more probably true [than] not true that she did give notice of the alleged occupational accident which she claims as a consequence of her employment with respondent.

ISSUES

[1] Respondent is referred to as "Sara Lee" in the record. For purposes of this review, both will be considered as part of the same corporate entity.

The initial preliminary hearing was held on June 11, 2013. The ALJ entered an order on June 12, 2013, in which the issues were discussed and the parties were ordered to agree on a physician to conduct a neutral medical evaluation. Regarding notice, the ALJ noted that claimant's testimony about providing notice to respondent's HR Department was uncontroverted and that "[i]f representatives from the respondent['s] HR Department likewise deny claimant's allegations, a re-weighing of the evidence may be necessary."[2] Board review of the June 12, 2013 Order was not requested.

On June 24, 2013, respondent took the deposition of Anita Antony, formerly with respondent's HR Department. A second preliminary hearing on October 15, 2013, resulted in the October 31, 2013, preliminary hearing Order now before the Board. The ALJ found claimant proved she sustained personal injury by accident arising out of and in the course of her employment, and that respondent was given timely notice of claimant's injury.

Respondent maintains claimant did not prove personal injury by accident arising out of and in the course of her employment on February 9, 2012. Respondent also claims it did not receive timely notice of claimant's alleged injury.[3]

Claimant argues the ALJ's Order should be affirmed.

The issues raised on review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of her employment with respondent?

2. Was respondent given timely notice of claimant's injury?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

In December 2010, claimant was hired by respondent as a secondary packer, which required her to run machinery that produced lunch meat and a case closer or box machine. The job also required claimant to lift meat.[4]

Claimant described her February 9, 2012, accident as follows:

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[2] ALJ Order (June 12, 2013) at 2.

[3] Application for Review at 2.

[4] P.H. Trans. (Jun. 11, 2013) at 5.

> A. Yes. It was like we were getting ready to be off that night and we were cleaning up. As we were going about cleaning up, I went to lift up a tub of meat and normally they should only weigh like maybe 50 pounds.
>
> It didn't -- they don't have no scales to weigh them. I just tried to attempt to lift it by myself and lifted it and popped my back and felt excruciating pain from there.[5]

Claimant testified she felt pain from her neck to her low back. The accident occurred near the end of claimant's shift, following which claimant tried to report her injury to her immediate supervisor, Bentley Nielsen, but she could not find him. Claimant testified she called respondent the following day, Friday, February 10, 2012, and left a voice mail message for Mr. Nielsen that she would not be at work that Friday because she had pulled a muscle in her back the previous night. According to claimant, on Monday, February 13, 2012, she had a telephone conversation with respondent's company nurse, Amber Allen. Claimant testified she told Ms. Allen that "I thought I had a pulled muscle and I injured myself on the 9th at work."[6]

A second conversation between claimant and Ms. Allen occurred on approximately February 15, 2012, and was described by claimant as follows:

> A. She [Amber Allen] informed me that they [Ms. Allen, Mr. Nielson, and respondent's HR generalist, Anita Antony] got together and watched the video[7] and that she had saw where I had injured my back -- or they had saw me. Bentley Nielsen, Anita Anthony and Amber Allen sat down and watched the video together and saw where I injured my back.
>
> Q. Obviously they couldn't see your back popping. So what is it that you thought she was seeing?
>
> A. She said that they had saw what I had described as far as lifting the meat and the time the injury had occurred.[8]

According to claimant, she requested medical treatment from respondent, but was advised by Ms. Allen to seek medical treatment on her own. Ms. Allen also told claimant to apply for short-term disability benefits through the Reed Group. Claimant testified:

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[5] *Id*.

[6] *Id.* at 8.

[7] The video to which reference is made allegedly depicts claimant performing her job on the date of alleged accident. No video is in the record.

[8] P.H. Trans., (Jun. 11, 2013) at 10.

> Q. [by claimant's counsel] Okay. So when you had a conversation with Ms. Allen about needing treatment and applying for workers' compensation, are you absolutely certain that you shared with her that it was associated with your back that you had injured from lifting that tub of meat on February 9th, 2012?
>
> A. Yes. We went back several times about it, and it was only until I went to the doctor about it and the doctor started treating me, doing the MRIs and it got to the point to where she had -- after getting the MRIs back, she had set me up for like the epidural injections, and that's when it came into play that this was a workman's comp issue.[9]

Claimant testified she informed the Reed Group that she had injured her back at work on February 9th and that was why she applied for disability benefits. Claimant was approved to receive short-term disability benefits which were paid through August 2012.

Claimant received ER treatment for a variety of symptoms, including passing out, headaches and stress, on January 31, 2012, just nine days before the injury.

The first medical treatment claimant sought after the alleged accident was on March 5, 2012, when claimant saw Dr. Anna Wagner for a follow-up appointment for the January 31, ER visit. Claimant's history of injury to Dr. Wagner is consistent with her testimony. Claimant was treated by Dr. Wagner with medications and an MRI scan. Claimant also received a series of three epidural steroid injections, which claimant testified worsened her symptoms. Claimant was referred to a surgeon, Dr. Steven Wilkinson, who prescribed physical therapy and pool therapy, neither of which alleviated claimant's symptoms.

Claimant ultimately underwent surgery, performed by Dr. Wilkinson on November 28, 2012, consisting of a lumbar laminotomy and foraminotomy, including partial facetectomy, with decompression of the nerve root and discectomy on the left at L5-S1, as well as destruction by thermoablation of the paravertebral facet joint nerves on the right at L4-5, left L4-5, and right L5-S1.

Although claimant experienced some relief of her preoperative symptoms, she still had significant pain in her lower back, upper back, right arm and hand as well as pain that ran down her legs to her buttocks. Claimant testified she had a 10 rating based upon a pain scale of 1 to 10, 10 being the most severe.

On October 3 or 4, 2012, claimant was notified by respondent her employment was being terminated. Claimant's last day of actual work for respondent was February 9, 2012.

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[9] *Id.* at 12.

Dr. James Stuckmeyer evaluated claimant on February 19, 2013, at her attorney's request. The doctor reviewed claimant's medical records, took a history and performed a physical examination. The history of injury in Dr. Stuckmeyer's report is consistent with claimant's testimony. Dr. Stuckmeyer opined:

> It is the opinion of this examiner that the patient's ongoing cervical, thoracic, and right upper extremity radicular complaints, as well as lower back complaints, left lower extremity radicular complaints, and bilateral knee symptoms, are a direct, proximate, and prevailing result of the accident occurring on or about February 9, 2012.[10]

Claimant was interviewed by a "leave specialist" with the Reed Group on or about February 21, 2012. In the interview, claimant stated her claim for short-term disability benefits was not related to her work.[11] The reason given for the claim for short-term disability was "[p]anic attacks, stress and sore back."[12]

Dr. John Ciccarelli performed a neutral medical evaluation on September 26, 2013. The doctor reviewed claimant's medical records, took a history and performed a physical examination. The history of injury provided to Dr. Ciccarelli was consistent with claimant's testimony. Dr. Ciccarelli's diagnosis was "work related cervical disc herniation at C6-C7 with continued symptomatic [right] C7 radiculopathy."[13] He opined: "I feel the work injury is the prevailing factor [in the] need for the recommended treatment."[14]

Amber Allen, respondent's plant nurse, testified at the June 13, 2012, preliminary hearing. She worked for respondent from September 11, 2011, through June 15, 2012. Ms. Allen testified she was authorized by respondent to receive notice of work-related injuries.[15] Another of Ms. Allen's duties was to log the details of work injuries into the computer. Ms. Allen testified claimant did not report she had been injured on the job:

> Q. Okay. And the time she mentioned back pain, any statement to you that it was somehow work related?

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[10] P.H. Trans. (June 11, 2013), Cl. Ex. 2 at 5-6.

[11] *Id.*, Resp. Ex. A at 11.

[12] *Id.* at 11.

[13] P.H. Trans. (Oct. 15, 2013), Joint Ex. 1 at 4.

[14] *Id.*

[15] P.H. Trans. (June 11, 2013) at 58.

> A. She did. She had told me on -- I had asked her, you know, what the pain back -- why she was having the back pain. She stated it was due to lifting an inedible tub, which is a tub that they use in secondary pack.
>
> I then inquired further as to when this happened and if she ever reported it. She couldn't remember at the time exactly what date it happened. She had told me she had thought was around 2/8.
>
> Q. February 8?
>
> A. Correct, 2/8/12.
>
> Q. And had she reported it to anybody else prior to 3/12, March 12th?
>
> A. Not my knowledge. If she had, I was not aware of it.[16]

Bentley Nielsen, respondent's second shift supervisor, also testified at the June 13, 2012 Preliminary hearing. According to Mr. Nielsen, claimant did not report a work-related injury to him and claimant did not leave him a voice-mail message.

Both Ms. Allen and Mr. Nielson denied looking at a surveillance video.[17]

Anita Antony testified by deposition that she worked as a human resources generalist for respondent from January 24, 2011 through March 23, 2013. Ms. Antony remembers directing claimant to the company nurse. Ms. Antony testified:

> Q. But you indicated in this telephone conversation that you had with Ms. Antony (sic) that you're not exactly sure when it occurred. She did tell you about having an injury at work, correct?
>
> A. She did. It was, I can guarantee it was over a month and a half after she had been out because it was after an extended period when I notified Amber Allen that she would be contacting her about this issue.[18]

Ms. Antony further testified:

> Q. Did you ever have any conversations specifically with her supervisor Bentley Nielson about this alleged lifting event on February 9th, 2012?

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[16] P.H. Trans. (Jun. 11, 2013) at 49-50.

[17] *Id.* at 51, 58.

[18] Antony Depo. at 21-22.

A. I did. I do not recall the specifics. I think I did ask maybe if he was aware of her situation, of the situation, and that was the extent of our conversation.[19]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(a), (b) and (c) provide:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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[19] *Id*. at 24.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520(a):

(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or

repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

The undersigned Board Member agrees with the ALJ that claimant sustained personal injury by accident arising out of and in the course of her employment on February 9, 2012, and that respondent was given timely notice of claimant's injury by accident.

The issue of whether claimant proved personal injury by accident arising out of and in the course of employment requires no extended discussion. Claimant's description of her accidental injury is largely undisputed. The histories provided to the medical providers (including Drs. Wagner, Wilkinson, Stuckmeyer and Ciccarelli) are consistent with

claimant's testimony. Moreover, the reports of Dr. Stuckmeyer and the neutral doctor, Dr. Ciccarelli, support that the "prevailing factor" requirement has been proven by claimant.

The more difficult issue is whether respondent was given timely notice in this claim. The evidence regarding notice is conflicting and the determination of the issue requires an assessment of the credibility of the witnesses. The ALJ apparently found claimant's evidence was more credible than respondent's evidence on this issue and the undersigned can perceive no error in the ALJ's findings.

Four witnesses testified on the issue of notice. Three of those witnesses testified in front of Judge Howard. While the Board conducts a *de novo* review, the Board often gives some deference to an ALJ's findings and conclusions concerning credibility when the judge was able to observe the testimony in person. Appellate tribunals are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor.[20]

The undersigned Board member provides some deference to the ALJ's implicit finding regarding the credibility to be accorded to claimant's evidence on the issue of notice. Claimant testified she provided notice to respondent when she left a voice-mail message for Mr. Nielsen on Friday, February 10, 2012, and again in a telephone conversation with Ms. Allen on Monday, February 13, 2012. Claimant again provided notice to Ms. Allen on approximately February 15, 2012. The dates on which claimant testified to she provided notice to respondent are within the requirements of K.S.A. 2011 Supp. 44-520.

CONCLUSION

This Board Member finds that:

1. Claimant sustained personal injury by accident arising out of and in the course of her employment.

2. Respondent was given timely notice of claimant's injury by accident.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[20] See *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103, 869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[21] K.S.A. 44-534a.

as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[22]

WHEREFORE, the undersigned Board Member finds that the October 21, 2013, preliminary hearing Order entered by ALJ Steven Howard is affirmed.

IT IS SO ORDERED.

Dated this 10th day of February, 2014.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Steven Howard, ALJ

[22] K.S.A. 2011 Supp. 44-555c(k).